Century Software (M) Sdn Bhd v Northport (M) Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCvC)(W)-1110–05 OF 2018 AND W-02(NCvC)(W)-1132–05 OF 2018
ZALEHA YUSOF, YAACOB MD SAM AND LAU BEE LAN JJCA
11 DECEMBER 2020

Contract — Termination — Wrongful termination — Whether clause in contract giving party unilateral right to terminate contract without giving reason was repugnant to rest of contract and could not be upheld — Whether said clause clashed with another requiring defaulting party to be first given written notice to remedy any breach within seven days before termination was resorted to — Whether allowing one party to arbitrarily terminate contract without assigning reason made no commercial sense especially when contract had been substantially performed — Whether unlawful termination by one party amounted to a constructive breach which made it impossible for the other party to perform the contract further — Whether in such event party disabled from performing was entitled to be paid the balance price of the contract and to be put in a position as if the contract had been fully performed

The appeals herein concerned a contract between Northport (M) Bhd ('Northport') and Century Software (M) Sdn Bhd ('CS') to replace Northport's financial and accounting management system with a new one provided by CS ('the System') and thereafter for CS to provide two years of support and maintenance services for the System. Some months after the System was activated, although not without a host of problems, Northport suddenly and unilaterally terminated the contract ('the agreement') claiming that under cl 23 thereof, it had the right to do so without giving any reason. Northport claimed that the termination was caused by a total failure of consideration because CS had failed to provide a fully-functional System which accorded with the terms and conditions of the agreement and that the System that was provided did not fulfill Northport's requirements and was not fit for its intended purpose. Following upon the issuance of the termination notice, Northport sued CS for loss and damages in the sum of RM2,186,123.31. In its defence, CS contended that the termination was invalid as Northport had accepted, implemented and extensively used the System in its daily operations. CS counterclaimed for payment of the balance contract sum of RM2.22m plus another RM1,986,000 for additional works and services it had undertaken and materials it had supplied. The High Court held that the termination of the agreement to be invalid and dismissed Northport's claim on finding that the agreement had been substantially performed. The court, however, dismissed

CS's counterclaims on finding that it had 'failed to deliver a fully-functional financial System in accordance with the agreement'. With regard to the termination, the trial court found that: (a) Northport's claim that it had a freestanding right to terminate without giving any reason under cl 23 was repugnant to the rest of the agreement which provided that the System's implementation would take an eight-month period followed by a 36-month warranty period and a further two years of maintenance and support by CS; and (b) Northport should have, but failed to, exercise the termination procedure specified in cl 22 of the agreement which was to first give a written notice to CS specifying the breach in question and requiring it to be remedied within seven days before resorting to issuing the termination notice if the notice to remedy was not heeded. In the instant appeals, the parties appealed against the dismissal of their respective claims against the other.

Held, unanimously dismissing Northport's appeal and allowing Century Software's counterclaim for RM2.22m with interest thereon at 5%pa from the date of judgment until full payment:

(1) The High Court correctly held the notice of termination to be invalid. Clause 23 of the agreement clashed with the agreed timelines of the eight-month period for implementation of the System, the 36 months' warranty period from Go-Live on 1 March 2015 and a further two years of support services from Century Software ('CS'). Clause 23 did not give Northport a freestanding right to terminate the agreement unilaterally. If that was the case, cl 23 could be easily used to subvert and render illusory the purpose of cl 22 which was to give CS a seven-day grace period to remedy a breach and protect it from a unilateral termination by Northport. Nothing in the agreement allowed cl 23 to supersede cl 22 and the construction that cl 22 prevailed over cl 23 made more commercial sense than holding that cl 23 superseded cl 22 (see paras 23 & 25–27).

(2) The trial court correctly applied the test of 'whether the party in default failed to perform its promise in its entirety' to conclude that CS had expended much time, cost and efforts in developing, testing, training and implementing the System thereby disentitling Northport from terminating the agreement on the ground of total failure of consideration. There was substantial performance of the agreement and therefore Northport could not terminate. Northport's argument that it had the right to terminate because of the trial judge's finding in her judgment that CS 'failed to deliver a fully functioning financial system in accordance with the agreement' was not tenable because the test was not whether the innocent party received anything under the contract but whether the defaulting party had failed to perform its promise in its entirety (see 35–39 & 97).

(3) The trial court's finding that Northport had unlawfully terminated the agreement rendered Northport to be in constructive breach of the agreement — since its breach made it impossible for CS to continue to perform the contract — and entitled CS to enforce its rights including being entitled to the balance sum of RM2.22m due under the contract and to be put in a position as if the contract had been performed. The trial judge failed to consider this point and erred in dismissing CS's counterclaim for the RM2.22m (see paras 41 & 103).

(4) The System was robustly tested in February 2015 before it went live on 1 March 2015. Northport started using the System to run its financial operations and did so extensively for the next 16 months. On the evidence, there was no basis for Northport to argue that CS had not delivered a fully functional System in accordance with the terms and conditions of the agreement or that the System was not fit for its intended purpose or that it had not fulfilled Northport's requirements. The trial court erred in accepting that argument and dismissing CS's counterclaim for the RM2.22m. Northport had accepted and extensively used the System that CS had delivered and it was still in possession and control of the System till to date (see paras 68, 85 & 102).

(5) CS's counterclaim for RM1,986,000 in respect of additional work it had purportedly carried out for enhancement, additional services and 'Jitterbit' had to be dismissed because: (a) no grounds were raised in the memorandum of appeal in respect of this amount; (b) it was raised for the first time in defence and counterclaim; (c) it was an afterthought and was never communicated to Northport during the period of the agreement, nor was it invoiced; (d) the rates on which the claim was based were not agreed between the parties nor stated in the agreement; and (e) the evidence to support the claim was inadequate and was not made available to Northport (see para 104).

[Bahasa Malaysia summary

Rayuan semasa ini berkait dengan kontrak antara Northport (M) Bhd ('Northport') dan Century Software (M) Sdn Bhd ('CS') untuk menggantikan sistem pengurusan kewangan dan perakaunan Northport dengan yang baru yang disediakan oleh CS ('Sistem tersebut') dan selepas itu bagi CS untuk menyediakan perkhidmatan sokongan dan penyelenggaraan selama dua tahun untuk Sistem tersebut. Beberapa bulan setelah Sistem tersebut diaktifkan, walaupun tanpa masalah yang banyak, Northport tiba-tiba dan secara sepihak menamatkan kontrak ('perjanjian tersebut') dengan mendakwa bahawa di bawah klausa 23, ia berhak untuk melakukannya tanpa memberikan sebarang alasan. Northport mendakwa bahawa penamatan tersebut disebabkan oleh kegagalan balasan sepenuhnya kerana CS gagal menyediakan Sistem yang berfungsi sepenuhnya yang sesuai dengan terma dan syarat perjanjian tersebut dan bahawa Sistem yang disediakan tersebut tidak memenuhi keperluan

Northport dan tidak sesuai untuk tujuan yang dimaksudkannya. Berikutan pengeluaran notis penamatan, Northport menyaman CS atas kerugian dan ganti rugi berjumlah RM2,186,123.31. Dalam pembelaannya, CS berpendapat bahawa penamatan tersebut adalah tidak sah kerana Northport telah menerima, melaksanakan dan menggunakan Sistem tersebut secara meluas dalam operasi hariannya. CS membuat tuntutan balas untuk pembayaran baki kontrak berjumlah RM2.22 juta dengan RM1,986,000 lagi untuk kerja dan perkhidmatan tambahan yang telah dijalankannya dan material yang dibekalkannya. Mahkamah Tinggi memutuskan bahawa penamatan perjanjian tersebut adalah tidak sah dan menolak tuntutan Northport dengan dapatan bahawa perjanjian tersebut telah dilaksanakan secara substansial. Walau bagaimanapun, mahkamah menolak tuntutan balas CS kerana mendapati bahawa ia 'gagal memberikan Sistem kewangan yang berfungsi sepenuhnya bersesuaian dengan perjanjian tersebut'. Berkenaan dengan penamatan tersebut, mahkamah perbicaraan mendapati bahawa: (a) tuntutan Northport bahawa ia memiliki hak bebas untuk penamatan tanpa memberikan alasan di bawah klausa 23 telah bertentangan dengan keseluruhan perjanjian tersebut yang menyatakan bahawa pelaksanaan Sistem akan mengambil tempoh masa lapan bulan diikuti dengan tempoh jaminan 36 bulan dan penyelenggaraan dan sokongan selama dua tahun lagi oleh CS; (b) Northport seharusnya, tetapi gagal, melaksanakan prosedur penamatan yang dinyatakan dalam klausa 22 perjanjian tersebut yang pertama kali memberikan notis bertulis kepada CS yang menyatakan pelanggaran yang dimaksudkan dan memerlukannya untuk memperbaikpulih dalam masa tujuh hari sebelum mengeluarkan notis penamatan sekiranya notis untuk memperbaikpulih tidak dilaksanakan. Dalam rayuan semasa, pihak-pihak mengemukakan rayuan terhadap penolakan tuntutan masing-masing antara satu sama lain.

Diputuskan, dengan sebulat suara menolak rayuan Northport dan membenarkan tuntutan balas Century Software dengan berjumlah RM2.22 juta dengan faedah pada kadar 5% setahun dari tarikh penghakiman sehingga pembayaran penuh:

(1) Mahkamah Tinggi telah dengan tepat dalam memutuskan bahawa notis penamatan adalah tidak sah. Klausa 23 perjanjian tersebut telah berlaga dengan jangka masa yang dipersetujui iaitu tempoh lapan bulan untuk pelaksanaan Sistem tersebut, tempoh jaminan 36 bulan dari Go-Live pada 1 Mac 2015 dan dua tahun perkhidmatan sokongan lanjutan dari Century Software ('CS'). Klausa 23 tidak memberikan Northport hak bebas untuk menamatkan perjanjian tersebut secara sepihak. Sekiranya ia berlaku, klausa 23 dapat dengan mudah digunakan untuk melemahkan dan menjadikan tujuan klausa 22 ilusi yang mana adalah untuk memberi CS masa penangguhan selama tujuh hari untuk memperbaikpulih pelanggaran dan melindunginya dari penamatan secara sepihak oleh

A Northport. Tidak ada apa-apa dalam perjanjian yang membenarkan klausa 23 melangkaui klausa 22 dan konstruksi bahawa klausa 22 melangkaui klausa 23 adalah lebih masuk akal secara komersial daripada memutuskan bahawa klausa 22 melangkaui klausa 22 (lihat perenggan 23 & 25–27).

B (2) Mahkamah perbicaraan dengan tepat menerapkan ujian 'whether the party in default failed to perform its promise in its entirety' untuk menyimpulkan bahawa CS telah menghabiskan banyak masa, kos dan usaha dalam membangunkan, menguji, melatih dan menerapkan Sistem C tersebut dengan demikian menafikanhak Northport daripada menamatkan perjanjian dengan alasan kegagalan sepenunya balasan. Terdapat pelaksanaan yang besar perjanjian tersebut dan oleh itu Northport tidak dapat menamatkan. Hujah Northport bahawa ia berhak untuk penamatan kerana keputusan hakim perbicaraan dalam D penghakimannya bahawa CS 'failed to deliver a fully functioning financial system in accordance with the agreement' tidak dapat dipertahankan kerana ujian tersebut bukanlah sama ada pihak yang tidak bersalah menerima sesuatu di bawah kontrak tetapi sama ada pihak yang ingkar gagal menunaikan janjinya secara keseluruhan (lihat perenggan E 35–39 & 97).

(3) Dapatan mahkamah perbicaraan bahawa Northport telah menghentikan perjanjian secara tidak sah telah menyebabkan Northport berada dalam pelanggaran perjanjian secara konstruktif — kerana pelanggarannya F menyebabkan mustahil bagi CS untuk terus melaksanakan kontrak — dan berhak bagi CS untuk mengguna pakai haknya termasuk berhak dengan baki sejumlah RM2.22 juta yang perlu dibayar di bawah kontrak dan diletakkan dalam kedudukan seolah-olah kontrak tersebut telah dilaksanakan. Hakim perbicaraan gagal mempertimbangkan perkara ini G dan terkhilaf dalam menolak tuntutan balas CS untuk jumlah RM2.22 juta (lihat perenggan 41 & 103).

(4) Sistem tersebut telah diuji secara menyeluruh pada bulan Februari 2015 sebelum ia dilancarkan pada 1 Mac 2015. Northport mula menggunakan H Sistem tersebut untuk menjalankan operasi kewangannya dan melakukannya secara meluas selama 16 bulan berikutnya. Berdasarkan keterangan tersebut, tidak ada asas bagi Northport untuk berhujah bahawa CS tidak memberikan Sistem yang berfungsi sepenuhnya bersesuaian dengan terma dan syarat perjanjian atau bahawa Sistem I tersebut tidak sesuai untuk tujuan yang dimaksudkan atau bahawa ia tidak memenuhi syarat Northport. Mahkamah perbicaraan terkhilaf dalam menerima hujahan tersebut dan menolak tuntutan balas CS untuk jumlah RM2.22 juta. Northport telah menerima dan secara meluas menggunakan Sistem yang telah diberikan oleh CS dan ia masih dalam

milikan dan kendalian atas Sistem tersebut hingga kini (lihat perenggan 68, 85 & 102).

(5) Tuntutan balas CS untuk RM1,986,000 berkaitan dengan kerja tambahan yang kononnya dilakukan untuk peningkatan, perkhidmatan tambahan dan 'Jitterbit' harus ditolak kerana: (a) tiada alasan yang dikemukakan dalam memorandum rayuan berkenaan dengan jumlah ini; (b) ia dibangkitkan untuk pertama kalinya dalam pembelaan dan tuntutan balas; (c) ia adalah pemikiran semula dan tidak pernah dimaklumkan kepada Northport selama tempoh perjanjian, dan juga tidak diinvois; (d) kadar berkaitan tuntutan tersebut tidak dipersetujui antara pihak-pihak atau dinyatakan dalam perjanjian; dan (e) keterangan untuk menyokong tuntutan tersebut tidak mencukupi dan tidak disediakan kepada Northport (lihat perenggan 104).]

Cases referred to

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697; [2007] 2 MLRA 584, FC (folld)

Arnold v Britton and others [2015] UKSC 36, SC (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (folld)

Bolton v Mahadeva [1972] 2 All ER 1322, CA (refd)

Chain Cycle Sdn Bhd v Government of Malaysia [2015] 9 MLJ 214, HC (distd)

Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464, FC (refd)

Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122, CA (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (distd)

Hind Construction Contractors v State of Maharashtra 1979 AIR 720, SC (refd)

Hoenig v Isaacs [1952] 2 All ER 176, CA (refd)

KP Kunchi Raman v Goh Brothers Sdn Bhd [1978] 1 MLJ 89 (refd)

SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464, FC (folld)

Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131, CA (refd)

Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 5 MLJ 157, CA (refd)

Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd [2009] 2 MLJ 546, CA (refd)

UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)

Legislation referred to

Contracts Act 1950 ss 40, 56(1)

Appeal from: Civil Suit No WA-22NCVC-283–05 of 2018 (High Court, Kuala Lumpur)

K Chandrasekar (S Seenivasagam with him) (Azariah & Assoc) in Civil Appeal No W-02(NCvC)(W)-1110–05 of 2018 for the appellant.

Christopher Arun (Patricia Jayne Noeb with him) (Ariff Rozhan & Co) in Civil Appeal No W-02(NCvC)(W)-1132–05 of 2018 for the appellant.

Christopher Arun (Patricia Jayne Noeb with him) (Ariff Rozhan & Co) in Civil Appeal No W-02(NCvC)(W)-1110–05 of 2018 for the respondent.

K Chandrasekar (S Seenivasagam with him) (Azariah & Assoc) in Civil Appeal No W-02(NCvC)(W)-1132–05 of 2018 for the respondent.

Lau Bee Lan JCA:

[1] There are two appeals before us which were heard together. They are:

(a) Appeal 1110 which is the appellant's appeal against part of the decision of the learned High Court judge ('judge') dismissing its counterclaim against the Respondent; and

(b) Appeal 1132 which is the appellant's appeal against part of the decision of the learned High Court judge dismissing its claim against the respondent for RM2,186,123.31 together with interest and cost.

[2] The parties will be referred to as they were in proceedings before the High Court. The defendant, Century Software (M) Sdn Bhd is the appellant in Appeal 1110 and the respondent in Appeal 1132 whilst the plaintiff, Northport (M) Bhd is the appellant in Appeal 1132, and the respondent in Appeal 1110.

[3] After perusing the written and oral submissions of the respective counsel and the records of appeal, we had unanimously dismissed the appeal of the plaintiff in Appeal 1132 and allowed part of the appeal of the defendant in Appeal 1110. These are the reasons for our decisions.

SALIENT BACKGROUND FACTS

[4] The following facts are undisputed as they are agreed facts. The plaintiff is in the business of offering facilities and services to handle a wide variety of cargoes ranging from containers to cars, break bulk cargoes as well as having the capacity to handle liquid and dry bulk cargoes of all types and shipment sizes.

[5] The defendant is in the business of providing financial management solutions, e-payment gateway services, and investment/asset management solutions.

[6] The plaintiff, after considering several proposals from various parties, awarded the tender for the replacement of Flexidata, its financial and accounting management system to the defendant via a letter of award dated 26 May 2014 ('letter of award') which was accepted by the defendant on 2 June 2014.

[7] Pursuant to cl 2 of the letter of award, the contract was awarded to the defendant 'based on the full compliance with the tender specifications and the terms and conditions as stipulated in the abovesaid tender submission, this letter of award and to a formal Contract Agreement'.

[8] The plaintiff and the defendant entered into the formal contract 'For Replacement of Financial & Accounting Management System with Two (2) Years of Support & Maintenance Services' on 10 October 2014 ('agreement').

FINDINGS AND DECISIONS OF THE HIGH COURT

[9] Prior to the execution of the agreement, the parties were engaged in numerous 'Working Committee' and 'Steering Committee' meetings which were held from 11 June 2014 (the kick off meeting) to 25 February 2015 to monitor the progress of the defendant's system called the 'Century Financial Management and Accounting System (CFMAS)' ('the System').

[10] There were numerous problems in respect of the implementation of the System resulting in the plaintiff's refusal to sign off the user acceptance tests ('UATs') in respect of modules such as the accounts payable, general ledger, cash book, billing, fixed asset, investment and loan and lease.

[11] Interfacing with other systems utilised by the plaintiff was also not successful.

[12] The System was implemented on 1 March 2015 without UAT sign off upon the defendant furnishing a letter of undertaking dated 27 February 2015 whereby it was stated:

> 2. The Steering Committee (SC) agree to CFMA [the System] to Go-Live on 1st March 2015 with the following condition:
>
> i. All Open High impact issues are closed upon Go-Live.
>
> ii. Medium range issues during parallel run will be closed within 1 week after Go-Live.

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iii. 3 consultant will be stationed at Northport site till 61h March 2015 to support CFMAS users.

iv. After 6th March 2015, support will be provided when issues are logged into our support portal (RFS). We will provide the URL and login credentials accordingly; and

B

3. [Defendant] would like to give [plaintiff] commitment that all outstanding issues will be fixed and closed accordingly after Go-Live.

[13] The defendant introduced the 'Request for Service' facility/support portal ('RFS') on or around 6 March 2015 to enable the plaintiff to register the issues and problems faced by the plaintiff and the defendant (agreed fact).

C

[14] The learned judge at para 49 of the grounds of judgment was satisfied on the evidence led, the issues which had not been resolved by the defendant included the following four issues:

D

(i) the forced closing of the accounts in February 2015 due to the issues which remained unresolved;

(ii) the inability to close the accounts for March 2015;

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(iii) there were issues of integration with other systems utilised by the plaintiff; and

(iv) the 'Integration Auto Failover' was not completed.

F

[15] The contract period in the agreement for the implementation of the System was for a duration of eight months from 2 June 2014 to 1 February 2015. The plaintiff contended that the defendant had failed to provide the plaintiff with a fully functioning system as set out in the agreement and that the System had not fulfilled the plaintiff's requirements and is not fit for the intended purpose.

G

[16] The plaintiff terminated the agreement by a notice of termination and demand dated 22 April 2016 pursuant to cl 23 of the agreement.

H

[17] The learned judge dismissed the plaintiff's claim for loss and damages of RM2,186,123.31, interest and costs primarily in light of Her Ladyship's findings that: (i) there was no total failure of consideration; (ii) cl 23 of the agreement was invalid and (iii) the letter of termination was not valid in law.

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[18] The learned judge likewise dismissed the defendant's counterclaim for the contracted amount of RM2.22m (Amount 1) and RM1,986,000 (Amount 2) for additional works, services and materials as particularised therein as Her Ladyship found there was no cogent evidence and the defendant had failed to deliver a fully functioning financial system in accordance with the agreement.

OUR DECISION IN APPEAL 1132

Whether the termination of the agreement is valid

Clauses 23 and 22 of the agreement

[19] Paragraph 2 of the notice of termination issued by the plaintiff states:

> We are instructed by our client to hereby give you 7 days' notice that the entire Agreement is terminated pursuant to Clause 23.0 of the Agreement.

[20] Learned counsel for the plaintiff submitted that the plaintiff terminated the agreement pursuant to cl 23 of the agreement which confers upon the plaintiff a contractual right to terminate the agreement in whole or in part at any time without assigning any reason by giving notice seven days in writing. Clause 23 reads as follows:

> 23.0 TERMINATION
>
> NORTHPORT reserves the right to terminate this Agreement in whole or in part at any time without assigning any reason by giving notice seven (7) days in writing. NORTHPORT shall not be liable for any loss or damage suffered by the Contractor arising from the termination of this Agreement under this Clause.

[21] In this regard, the learned judge held that:

(a) 'the plaintiff's right to terminate unilaterally is an arbitrary right which is repugnant to all the other clauses in particular clause 22 since there is an eight months period for implementation of the System and thereafter 36 months warranty period from *Go-live* which was on 1 March 2015 and a further two years of support';

(b) 'the plaintiff had failed to observe and comply with clause 22 as agreed upon between the parties';

(c) 'Clause 22 provides for a two stage notice procedure for termination. At the first stage, the plaintiff has to send a notice specifying the breaches and provide the defendant a seven days period to rectify the same. Thereafter the plaintiff may terminate by notice if these breaches continue past that seven days period'; and

(d) 'On the facts of this case this two stage agreed mode for termination was not complied with by the plaintiff. The preliminary notice specifying the breach and providing a seven days period for rectification was never issued. The plaintiffs letter of 30 March 2016 which preceded the termination letter merely highlighted the alleged breaches and that *Flexidata* had been reactivated'.

(paras 64, 68, 66 and 67 respectively of the grounds of judgment)

[22] Learned counsel for the plaintiff argued that the learned judge erred in her findings in para 21 (a)–(d) above for the following reasons:

(a) full effect must be given to cl 23 of the agreement as the terms of the clause are clear and unambiguous and it is valid and binding as it has been agreed by both parties with equal bargaining powers after a tender exercise and reference is made to the acceptance page. The Court of Appeal cases of *Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 5 MLJ 157, *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131, *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122, *Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd* [2009] 2 MLJ 546 were cited;

(b) there is no clause making it mandatory for the plaintiff to resort to cl 22 prior to exercising its right under cl 23;

(c) cl 23 is not an arbitrary right as it can and was exercised with good cause given that in para 3 of the notice of termination:

(i) the defendant failed to provide a fully functioning financial System to the plaintiff in accordance with the terms and conditions of the agreement;

(ii) the System was not fit for its intended purpose and had not fulfilled the plaintiff's requirements;

(d) there was no acceptance of the System by the plaintiff; and

(e) the provision under cl 23 of the agreement which states that 'NORTHPORT shall not be liable for any loss or damage suffered by the Contractor arising from the termination of this Agreement' fortifies the plaintiff's right to terminate with notice given that it makes provision for the consequences of termination 'under this Clause' which had to be contrasted with termination under cl 22 of the agreement which provides for different consequences.

[23] With respect we are unable to accept the aforesaid submission of the plaintiff that the learned judge has erred. In our considered opinion, Her Ladyship's findings in para 21(a) to (d) above are correct. The learned judge's finding is justified because as correctly submitted by the defendant cl 23 clashed with the agreed time lines of the eight months period for implementation of the System, 36 months warranty period from Go-Live on 1 March 2015 and a further two years of support services. The significance of the agreed time lines will be discussed at the appropriate place in this judgment.

[24] In *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464, briefly, by an agreement, the respondent appointed the appellant to assist with the collection of outstanding quit rent. The agreement included a term that allowed the respondent to terminate the agreement unilaterally by giving thirty days' notice to the appellant in the event that one of eight grounds, as set out in cl 8.1(b) of the agreement, was to occur. The respondent sought to terminate the agreement it had entered into with the appellant on grounds that the latter had breached various terms of the agreement. In purported exercise of its right under cl 8.1(b) of the agreement, the respondent issued a letter of a notice of termination giving 30 days' notice and the termination was effected by a subsequent letter. Both letters did not specify any reason for termination. The appellant commenced an action against the respondent and submitted, among others, that cl 8.1(b) could only be invoked after the procedure in cl 9 pertaining to conducting a performance review of the appellant company's performance of its services under the agreement had been satisfied.

The Court of Appeal upheld the decision of the trial judge in that an exercise of the of the right of termination under cl 8.1(b) was not connected with the review procedure under cl 9 and that the two clauses were to be read disjunctively. Dissatisfied the appellant sought leave to appeal and was granted leave by the Federal Court to proceed on the question of law as to whether a notice to terminate a privatisation agreement which was vague , unspecific and uncertain was defective and bad in law. The appellant's contention was that there was no review conducted of its performance and as a result no reasons were given for the purpose of determining it had fallen foul of cl 8.1(b). On this issue, the Federal Court at pp 465–465, among others, held:

> Upon the interpretation of ell 8 and 9 of the agreement as parts of a whole contract it was apparent that cl 8.1 did not provide a freestanding right to terminate the contract. If it was a freestanding right then it could be easily used to subvert the purpose of cl 9, which could not be the intention of the parties as objectively determined ... Arguably the purpose of this clause leans in favour of protecting the position of the appellant against wilful termination for one, and to provide an added layer of protection in that it was given the opportunity to 'remedy the unsatisfactory situation' in 30 days. It could not be the case that the respondent was allowed to circumvent the purpose of cl 9 by invoking unilateral termination under cl 8.1(b) when cl 9.3 itself refers to cl8.1(b) as a means of protecting the respondent's interests.

[25] Applying the principle adopted in *SPM Membrane*'s case to the appeal before us, we are of the view that reading cll 22 and 23 in the context of the agreement as a whole, it is clear that cl 23 does not provide a freestanding right to terminate the agreement. Objectively determined if it was interpreted otherwise, cl 23 could be easily used to subvert the purpose of cl 22 which is to give the defendant a seven days grace period, by invoking unilateral termination under cl 23. This court cannot allow the plaintiff to invoke

unilateral termination under cl 23 to circumvent the purpose of cl 22 which leans in favour of protecting the defendant and deny the defendant of the added layer of protection against such unilateral termination by the seven days grace period.

[26] In addition we are of the considered view that the contention of the plaintiff that cl 23 on the right of termination without assigning any reason superseded cl 22 cannot be sustained because we agreed with counsel for the defendant's oral submission that there is an absence of any clause to preserve its intent to do so in the agreement by using such words as 'notwithstanding any other terms' or 'without prejudice to the right to terminate under cl 22' (see p 493 [82] para G in *SPM Membrane*'s case).

[27] In *SPM Membrane*'s case, the Federal Court at p 491 para [78], among others, opined 'when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear'; and at p 492 para [79] after having referred to *Arnold v Britton and others* [2015] UKSC 36 expressed that the Supreme Court of UK 'is not totally opposed to the application of business common sense approach in construing a contract, in the absence of clear words'. In the context of the appeals before us, between the two interpretations, the first interpretation allows for a two stage notice procedure: at the first stage for the defendant to be given a written notice by the plaintiff specifying the breaches therein and a seven days period to rectify the same; and at second stage the plaintiff may terminate if the breaches remained not rectified past the seven days after issuance of a written notice. The other interpretation allows for termination of the agreement in whole or in part at any time without assigning any reason by giving seven days' notice in writing. In our view the first interpretation makes more commercial sense because cl 22 gives an opportunity to the defendant to remedy which would otherwise be illusory if cl 23 is permitted to supersede cl 22.

[28] Hence we conclude there is no merit in the plaintiff's contention in para 22(a) and (b) above.

No total failure of consideration

[29] Another ground canvassed by counsel for the plaintiff as to why the learned judge erred is when Her Ladyship held the termination of the agreement was invalid as there was no total failure of consideration. Firstly, Counsel submitted that there was a misdirection in law on the applicability of s 40 of the Contracts Act 1950 and the *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 in that the correct approach was for the learned judge to recognise that the

termination of the agreement was carried out pursuant to the express contractual agreement between the parties in the form of cl 23 and not by operation of law. To bolster its position, the plaintiff relied on *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441.

[30] In *Dream Property*'s case the subject matter revolved around the termination of a sale and purchase agreement entered between the appellant/defendant/purchaser with the respondent/plaintiff/registered proprietor of land/vendor for the purchase of land. Of importance was cl 12 of the said SPA which reads:

> Upon the interpretation of ell 8 and 9 of the agreement as parts of a whole contract it was apparent that cl 8.1 did not provide a freestanding right to terminate the contract. If it was a freestanding right then it could be easily used to subvert the purpose of cl 9, which could not be the intention of the parties as objectively determined.

As the respondent failed to receive the balance price even after three months of the extended completion date, it notified the appellant that the 10% deposit had been forfeited and pursuant to cl 12 of the SPA, the agreement automatically became null and void. At p 471 of the report, Azahar Mohamad FCJ (now Chief Judge of Malaya) (delivering the judgment of the Federal Court) stated that:

> [82] ... in view of the clear wording of cl 12, the parties to the SPA had agreed to waive the requirement for the issuance of a notice of termination upon the breach of the SPA ... [C] 12 expressly provides that the SPA 'shall be treated as null and void and of no further effect upon the non-payment of the balance purchase price within the stipulated time period'. In the result, the enforceability of cl 12 is not open to challenge.

[31] However it is to be noted that His Lordship at p 472 of *Dream Property*'s case stated:

> [84] *It is for the court to infer from the surrounding circumstance whether, pursuant to s 40 of the Contracts Act 1950, the plaintiff had elected to affirm in the continuance of the SPA or to treat it as at an end* (see the objective test propounded in *Mintye Properties Sdn Bhd v Yayasan Melaka* [2006] 6 MLJ 420; [2006] 4 CLJ 267). In our view, the letter dated 9 March 2006 and the plaintiff's conduct on 28 August 2006 in filing the writ of summons herein, which initiated the present suit against the defendant *provide compelling evidence of the plaintiff having treated the SPA as terminated to the knowledge of the defendant after the extended completion date of 21 May 2006*. (Emphasis added.)

[32] We are however of the considered view that *Dream Property*'s case can be distinguished where the intention of parties for an automatic termination was clear for reasons pointed out by the Federal Court. However in this instant

appeal, the plaintiff terminated not only under cl 23 (see para 19 above) but 'additionally' for the reasons spelled out in para 3 of the notice of termination which reads:

> 3. Additionally, we are instructed by our client to state that you have failed to provide our client with a fully functioning financial system ('System') in accordance with the terms and conditions of the Agreement. The System provided by you has not fulfilled our client's requirements and is not fit for its intended purpose, particulars of which you are aware of and have also been communicated to you.

[33] The learned judge noted para 3 of the notice of termination and observed that the plaintiff's basis for termination 'implies a total failure of consideration' because the reasons for termination was that the System was not fit for its purpose as it was not fully functional (paras 52 and 53 of the grounds of judgment).

[34] Her Ladyship then referred to s 40 of the Contracts Act which provides:

> 40 Effect of refusal of party to perform promise wholly.
>
> When a party to a contract has refused to perform, or disabled himself from performing, *his promise in its entirety,* the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[35] Her Ladyship noted that the phrase 'his promise in its entirety' in s 40 has been explained by Gopal Sri Ram FCJ (as he then was) in *Berjaya Times Squares* at p 611 as follows:

> Special attention should be paid to the phrase 'his promise in its entirety'. Under the section the right in a non-defaulter to repudiate a contract only accrues when the defaulter has refused to perform or has disabled himself or herself from performing the whole of his promise. If there is part performance by the defaulting party, the innocent party may not put an end to the contract.

In our judgment the learned judge's deduction that the applicable test is *'whether the party in default* has *failed to perform in its entirety'* (paras 55 and 56 of the grounds of judgment) is the correct approach by reason of the following:

(a) it is in accord with the judgment of the Federal Court at p 609 para [24] that s 40 of the Contracts Act is a restatement of the English common law position, a conclusion drawn after reference to several English cases (see paras 17–24 of the report); and

(b) it is confirmed by the dicta of the Federal Court at p 609 as follows:

> ... when deciding whether there is in a given case total failure of consideration, the court must first interpret the promise as a whole and next view the performance of the promise from the point of view of the party in

default. The test is not whether the innocent party received anything under the contract. The test is whether the party in default has failed to perform his promise in its entirety.

[36] Having regard to the test to be applied, the learned judge made the following findings of fact on the works executed by the defendant:

57. In this case, much evidence was led of the work done by the defendant in implementing its System: the copious minutes of the 'Working Committee' and 'Steering Committee' meetings bear testimony to the work done by the defendant. The defendant had expended time, cost and efforts in developing testing, training and implementing the System ...

(para 57 of the grounds of judgment)

[37] In our judgment these findings are correct as the evidence led at trial confirmed that works and services performed for the plaintiff's benefit from the first kick-off meeting (11 June 2014) included:

(i) Conducting Business Requirement Studies for both the financial modules and integration modules.

(ii) Thereafter, preparing and conducting reviews of the Implementation Papers until the plaintiff's agreement to the same.

(iii) Developing the System by configuring it to comply with the agreed Implementation Papers.

(iv) Conducting User Acceptance Tests on the newly developed System.

(v) Conducting Key User Trainings for the users.

(vi) Populating the new System with the data provided by the plaintiff.

(vii) Conducting a one month parallel live run for the entire month of February 2015 to enable the plaintiff to verify and satisfy itself of the integrity of the System.

(viii) The System running live solo from 1.3.2015 when the plaintiff laid down their legacy system Flexidata.

(ix) The defendant diligently and consistently resolving the issues raised in the RFS.

(x) The plaintiff thereafter using the System for their daily operations for 1 1/3 years.

(An illustrative Implementation Methodology and terminology used is in Appendix A of defendant's Appendix Bundle).

[38] The learned judge concluded the following in the grounds of judgment:

> 57 ... Unfortunately, it did not meet with the plaintiff's expectation and unhappiness in not receiving the entire promised bargain under the Agreement.
>
> 58. However, in light of the decision in *Berjaya Time Square* it cannot be said that there was total failure of consideration as the defendant had not failed to perform its obligation in its entirety. The termination was invalid. My finding is fortified by the evidence of the plaintiff's acquiescence of the continuance of the Agreement by the 6 extended deadlines.

[39] The plaintiff argued that the termination of the agreement is valid given that the learned judge made a finding in para 70 of the grounds of judgment that the defendant 'failed to deliver a fully functioning financial system in accordance with the Agreement'. With respect we are unable to agree with the plaintiff's approach on its right to termination from the angle that it did not receive the entire promised bargain under the agreement. To reiterate, the test is not what the plaintiff received but whether the defendant failed to perform its obligation in its entirety. Hence we are of the view that the learned judge's conclusion that the termination of the agreement was invalid is correct following the *Berjaya Times Squares*'s case that so long as there is part performance, the innocent party cannot terminate the contract.

[40] Since there is some amount of overlap on the matters pertaining to the contentions of the plaintiff that the defendant failed to deliver a fully functioning System and that there was no acceptance of the System by the plaintiff, these arguments will be dealt with under Appeal 1110.

[41] Further, we agreed with the defendant's submission that the finding of unlawful termination by the learned judge rendered the plaintiff in constructive breach of the agreement since the plaintiff is now in breach by making it impossible for the defendant to continue to perform its services during the warranty period which expired in March 2018. We drew support for this approach premised on the dicta of the Federal Court in *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697 at p 728; [2007] 2 MLRA 584 at p 610 as follows:

> [31] ... The reason for the termination of the services of the plaintiff by the defendant is thus not valid. There is therefore a constructive breach of contract by the defendant ...
>
> [32] Where a party by his own act makes it impossible for him to perform his contract at the due date, there is a constructive breach of contract, and the other party is entitled forthwith to enforce his rights as on a breach.

Reasons for the finding of constructive breach on the plaintiff's part will be elaborated when we examine the performance of the agreement during the warranty period under Appeal 1110.

APPEAL 1110

Whether the learned judge erred in dismissing the defendant's counterclaim

Failure to deliver a fully functioning System

[42] Learned counsel for the plaintiff submitted that this court ought not to disturb the following findings of the learned judge as they are findings of fact:

(a) 'With regard to the plaintiff's complaint that the defendant failed to resolve the 160 RFS Issues/Issues relating to primary functionalities/modules/stop production issues, I find there is credible evidence that there were still unresolved issues which resulted in the plaintiff reactivating its previous financial system ie Flexidata.'
(para 39 (vi) of the grounds of judgment);

(b) the four unresolved issues; and

(c) 'The defendant's counter claim for Amount (1) and Amount (2) and damages is similarly dismissed as there is cogent evidence before this court that it had failed to deliver a fully functioning financial system in accordance with the Agreement.' (para 70 of the grounds of judgment).

[43] Counsel relied on a dicta from the case of *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785. Here the Federal Court when addressing the primary issue of whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge at p 375 (MLJ); p 800 (CLJ) opined:

> It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *How Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b; [1978]1 LNS 32; *Watt or Thomas v Thomas* [1947] AC 484; and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004]4 CLJ 309).

[44] The 'plainly wrong' principle propounded in *UEM Group Bhd* is trite and cuts both ways. Contrary to the position taken by the plaintiff, it is the defendant's contention that the learned judge's findings on the four issues are plainly wrong due to insufficient judicial appreciation of the evidence adduced at trial. We find there is merit in the defendant's submission for the reasons discussed below. As alluded in para 14 above, the learned judge at para 49 of the grounds of judgment found four issues had not been resolved by the defendant. We note that these four issues were in fact a reproduction of items (iii) to (vi)

of the evidence in chief of PW1, Tamilmaran a/l Rajagopal (plaintiff's project manager) (Q&A 24 of PWS1).

(i) Closing of the accounts in February 2015; and

(ii) Inability to close accounts in March 2015.

[45] We shall deal with issues (i) and (ii) together as they relate to the closing of accounts in February and March 2015. Learned counsel for the defendant highlighted the following evidence adduced at trial. To reiterate, in para 37 above, we have stated that the System was run parallel to Flexidata throughout February 2015 before it was laid down on 1 March 2015. During cross-examination, Tamilmaran a/l Rajagopal (PW1 — plaintiff's project manager) agreed that the one month parallel run was necessary to enable the plaintiff's users to familiarise themselves to the System. In fact in answer to a query from the judge, PW1 testified that the staff would require about two to three months to 'break down on the new system'. In any event PW1 in cross-examination agreed that the defendant assisted the plaintiff in the March account closing. Thus the evidence showed that the accounts were closed with the defendant's assistance and issues (i) and (ii) are no longer live issues as they were resolved.

[46] In addition we observed that the plaintiff failed to produce the relevant contemporaneous documents to show that the state of the accounts were otherwise because evidence was led by the defendant that when PW1 was cross-examined pointedly '... that accounts were not closed or force closed, did you produce any documents before this Court? To show the Court 'Look here. This is the problem. We cannot close this. We cannot close this March because of the system problem' ...' PW1 answered 'No' and 'That you have to refer to Finance witness to produce'.

[47] Turning to the evidence of Aini bt Ajman (PW3 — Head of Finance), we observed that nothing useful was forthcoming from her, the very person whom PW1 said we ought to refer to. This is evident from the following evidence from PW3 during cross-examination (CENSOF's Appendix Bundle, Appendix B pp 25–27), including to a question posed by the learned judge:

> YA: Counsel is asking you about the specific account. Have you highlighted? Have you highlighted a specific account?
>
> AINI: The depreciated account was not.
>
> AINI: It's not tally. So that's what I mentioned earlier.

SSL: Alright. Ok. Never mind. You were saying that you answered it. And you will agree with me that you are not able to produce any evidence to show all these before this Court?

AINI: Yes.

[48] In light of the foregoing, we are constrained to agree with the defendant's submission that the learned judge had failed to refer to the evidence and in the absence of any contemporaneous documents, to evaluate and test the bare allegation of PW1 on the closing of the accounts.

(iii) Integration issues with other systems utilised by the plaintiff; and

(iv) 'Integration Auto Failover' not completed

[49] We shall deal with issues (iii) and (iv) together as they are essentially on integration issues which allegedly arose due to the absence of a feature called the 'Integration Auto Failover' which is a feature within an independent tool called Jitterbit. PW1 in cross-examination (CENSOF's Appendix Bundle, Appendix C pp 40–41) explained:

Integration Failover refers to integration process where in a system has two different server, A and B. Where the integration from other systems will be pumping in data into the Financial System ... Failover means, assuming that the integration of one server fails, it should automatically auto failover to the other server, where the system still can run.

PW1 during cross-examination agreed that at the time of the letter of award in May 2014, the plaintiff had chosen Jitterbit Community Version 3.0 (Community) which did not have the said feature of Integration Auto Failover. PW1 however confirmed the integration issue was resolved when the plaintiff agreed to purchase the upgraded version, Jitterbit Standard Version which possessed the feature in September 2015 which the plaintiff later paid RM188,000 in January 2016.

[50] In respect of issues (iii) and (iv), we find PW1 had admitted that the integration issues were resolved which however was not considered by the learned judge.

[51] In so far as the four issues are concerned, we agreed with the defendant's submission that the plaintiff did not in any way substantiate the four issues found by the learned judge as defects were correct. In light of the critical evidence we therefore agreed with the defendant's submission that the issues on the closing of accounts and integration were 'dead' issues which were resolved long before the termination in April 2016 which the learned judge failed to

consider. In our judgment had the learned judge appreciated and evaluated the evidence adduced at trial her conclusion on the determination of the four issues which she held were unresolved would have been different.

[52] In relation to the plaintiff's complaint that the defendant failed to resolve the 160 RFS Issues (para 39 (vi)) of the grounds of judgment (para 42(a) above) and to para 70 of the grounds of judgment (para 42(c) above), counsel for the plaintiff submitted that:

(a) the learned judge's conclusion after eight witnesses and ten days trial should not be brushed aside as it is a considered decision and a finding of fact made by the judge having the benefit of viewing all the witnesses, (ii) there is no misdirection of law as the learned judge's finding is fully justifiable in light of the following evidence alluded by plaintiff:

(i) particulars in the Minutes of the Steering Committee Meeting on 19 November 2015;

(ii) non-compliance of the 25 November 2015 deadline; and

(iii) plaintiff's letters dated 13 January 2016, 10 March 2016 and 30 March 2016.

[53] Learned Counsel for the plaintiff argued that the Minutes of the Steering Committee ('SC') of 19 November 2015 ('the 19 November 2015 Meeting') is the pivotal document which showed the following:

(a) all parties were present ie the defendant had five representatives including, the Chief Operating Officer (Paremeswaran a/l Rajagopal — DW1), General Manager and three Consultants whilst the plaintiff had seven representatives was represented, including, the Chairman and PW1, PW2 and PW3; and

(b) the agenda of the 19 November 2015 Meeting were '... system critical issues that effected the productivity and quality of Finance Division services ...' and the Minutes recorded that the System's outstanding issues concerned 'Core module deliverables' and '... CENSOF to tackle the (sic) all the critical issues (Stop and Impede Production) ...', performance issues still persisted, recurring issues and the conclusion of the 19 November 2015 Meeting was for CENSOF to resolve all critical issues by the deadline of 25 November 2015 (appellant's CB 2/3 in Appeal1132 pp 511, 513, 515 and 517). The defendant's position was that the 19 November 2015 Meeting was the culmination of other SC meetings which clearly showed as late as 19 November 2015 there were still issues which not been fulfilled by the fixed deadline.

[54] The plaintiff submitted that: (i) it was not incumbent upon it to respond to the defendant's 16 December 2015 email given that the defendant had failed to comply with the deadline; and (ii) it was untenable for the defendant to contend that issues were pending confirmation.

[55] In addition the plaintiff argued that the fact that there was no acceptance of the System and there were unresolved issues relating to the core modules/primary functionalities/stop production was reinforced with the plaintiff's letters dated 13 January 2016, 10 March 2016 and 30 March 2016 where it has been communicated to the defendant that:

(a) it has not delivered a fully functioning financial System in accordance with the agreement; and

(b) the System has not fulfilled the plaintiff's requirements and was not fit for its intended purpose.

[56] On a preliminary note, we wish to state that we are not able to agree with the Counsel for the defendant's oral submission that para 70 of the grounds of judgment (para 42(c) above) when taken in its totality meant that the learned judge's finding 'there is cogent evidence before the court that it failed to deliver a fully functioning financial system in accordance with the agreement' is confined to the four unresolved issues. The reason is due to the learned judge's findings of the four unresolved issues in para 39(vi) of her grounds of judgment as one of the findings (i) to (viii) in the said para which is as follows:

(a) '39. At the close of the full trial and upon hearing the submissions of the parties'; and

(b) the use of the word 'include' in her finding at para 49 which reads as follows:

> 49. From the evidence led, I was satisfied that the issues which had not been resolved by the defendant *include*

wherein the learned judge then spelled out the four unresolved issues.

[57] Turning now to the merits of the plaintiff's submission in paras 52–55 above, other than our observation made at para 56 above, with respect we are unable to agree with the plaintiff's aforesaid submission in paras 52–55. We reiterate that the four unresolved issues are stale issues. Since the resolution of the 160 RFS issues in para 52–55 are intertwined with the issue of acceptance of the System, we shall address the former issues whilst addressing the latter.

No acceptance of the System

[58] Counsel for the plaintiff contended that there was no acceptance of the System because the Finance Division's requirements were not met given the following:

(a) there was no sign off of the final acceptance certificate and the live acceptance certificate ('Go-Live Certificates'); and

(b) the defendant failed to resolve all issues relating to primary functionalities/core modules/stop production by the deadline of 25 November 2015.

[59] In response counsel for the defendant submitted that the plaintiff's contention is inconsistent with the plaintiff's conduct given that:

(a) the plaintiff accepted the System when it decided to Go-Live on 1 March 2015;

(b) the plaintiff's extensive usage thereafter for 1 1/2 years for its daily operation further buttressed the acceptance;

(c) the plaintiff's conduct of requesting the defendant to attend to the issues during the warranty period confirmed its acceptance and usage of the System.

[60] In rebuttal the plaintiff argued that the aforesaid contentions of the defendant are untenable as:

(a) the plaintiff only agreed to Go-Live subject to an undertaking by the defendant; and

(b) the warranty period never commenced given the conditional Go-Live.

[61] Our analysis on all of the parties' contentions are as follows. On the four unresolved issues we reiterate that these issues are stale issues. Next we observed that the learned judge took cognisance of the chain of events and facts which we have alluded at paras 9–13 and 15 before the plaintiff terminated the agreement on 22 April 2016. To recapitulate, the learned judge had noted that numerous problems arose in respect of the implementation of the System which was nevertheless implemented on 1 March 2015 without UAT sign off subject to the letter of undertaking dated 25 February 2015 from the defendant to the plaintiff titled 'CFMAS: LETTER OF UNDERTAKING *PRIOR TO GO-LIVE ON 1st MARCH 2015*'. The plaintiff agreed to the System Go-Live on 1 March 2015 subject to the letter of undertaking which contained the conditions which have been reproduced at para 12 above. Following this, it was agreed between the parties for the RFS to be set up to register the issues and problems faced by the plaintiff with the defendant.

[62] Apart from the above background which we agreed has been correctly narrated, we observed the following matters were wanting in the grounds of judgment: (i) the learned judge did not go into the specifics of her finding on the 160 RFS issues and what was the 'credible evidence that there were still unresolved issues which resulted in the plaintiff reactivating the previous financial system ie Flexidata'; (ii) the warranty period and its impact on whether there was acceptance of the System; and (iii) the 'cogent evidence 'which Her Ladyship held that the defendant 'had failed to deliver a fully functioning financial system in accordance with the Agreement' which led her to dismiss the defendant's counterclaim. This is a task which behoved upon us to undertake given the failure of the learned judge to address her mind and evaluate the evidence pertinent to these issues.

[63] In so far as the plaintiff's contention that it only agreed to Go-Live subject to an undertaking by the defendant, we find that the learned judge had so found the same which we agreed was correct.

[64] There is a sharp difference between the positions held by the parties as to when the warranty period begins. The defendant's position is after the System went live on 1 March 2015, the warranty period sets in and during the warranty period the plaintiff can register the issues and complaints into the System so that the defendant can undertake the necessary exercise to deal with them. The plaintiff's position is that the warranty period never commenced given the conditional Go-Live. Additionally during oral submission, counsel for the plaintiff premised on the defendant's argument submitted that: (i) if Go-Live did not happen on 1 March 2015, then the warranty period does not start and therefore the issues are not warranty period issues'; and (ii) it is not true the System went live on 1 March 2015 because the contemporaneous documents ie the letter of undertaking and the invoice was only issued by the defendant in December 2015.

[65] The warranty clause in Annexure F — Technical Specification which forms part of the agreement reads:

> 10 WARRANTY PERIOD
>
> The warranty period must be 36 calendar months from date of full implementation which is *after 'Go-Live'* covering all aspects of application software, supporting software, system software and hardware through preventive and corrective maintenance activities.
>
> In the event of any software and hardware defect during the warranty period, the vendor is to rectify the defect within the time limit specified in the following section while ensuring zero downtime without incurring Northport *any additional charges*. This covers all components of the application software, supporting software, system software, hardware and database management system. *Noncompliance* shall result in the vendor paying *a penalty fee*. (Emphasis added.)

[66] Looking at the warranty period clause in Annexure F, it can be seen that the plaintiff had drafted it widely: (i) to cover all aspects of the softwares and hardwares through preventive and corrective maintenance activities for an extended three year period from Go-Live; (ii) envisages that defects can arise but will be resolved during the warranty period; and (iii) in the event of non-compliance the agreed remedy for unresolved issues is that the defendant shall pay a penalty fee.

[67] There are no pre-conditions required of Go-Live Certificates and the issuance of invoices by the defendant for the period post Go-Live for the commencement of the warranty period as contended by the plaintiff. In our judgment the only criterion to trigger the warranty period is for the System to Go-Live as can be gleaned from:

(a) the opening words of the first para of warranty period clause that 'The warranty period must be 36 calendar months from date of full implementation which is *after* 'Go-Live' ...';

(b) 'Go-Live' is the term to denote 'Go Live is the day/time when the old Flexidata data system is laid and CFMAS runs solo';

(c) 'CFMAS/System' is the term to denote 'A term or a project code name given by Northport for this project.';

(d) 'RFS' is a term to denote 'a system where Northport lodges it (sic) issues *post go live*.';

(the terms referred in (b) to (d) are in Appendix A, Appeal 1110)

(e) para 2 of the letter of undertaking states that 'The [SC] agree to CFMA to Go-Live on *1st March 2015'* albeit with the conditions specified therein.

[68] Flowing from the background leading to the setting up of the RFS mentioned in para 61 above, a total of 160 issues were registered by the plaintiff into the System. It is not disputed that a lot of meetings were held which led to the 19 November 2015 meeting and the fixed deadline of 25 November 2015 to rectify the issues registered in the System. The System was robustly tested in February 2015 before it went live on 1 March 2015. Plaintiff started using the System to run its financial operations and did so extensively for the next 1 1/3 years. There is evidence from PW1 given under cross-examination that the defects during the warranty period is reported in the RFS System and PW3 agreed in cross-examination that the System went live on 1 March 2015 and the warranty period starts from there and that the defendant was providing support and maintenance as requested by the plaintiff (pp 507–508 *RR Jld* 2C (*Bhg* B) and (pp 716 *RR Jld* 2B (*Bhg* B)). In our considered view, consistent with the documentary and oral evidence it is after the System went Go-Live on 1 March 2015 that the warranty period sets in.

[69] Further, on the non-signing of the Go-Live Certificates, evidence was led that the plaintiff requested the defendant to forward the Go-Live Certificate for its execution vide PW1's email dated 26 February 2015 (p 520 CB 4/4 Appeal 1110) which states as follows:

> We require the certificate by tomorrow morning for CS and NMB Finance to sign off.

Despite the fact that PW1 during cross-examination confirmed that the plaintiff agreed to sign off the said certificate on 27 February 2015 (p 353 *RR Jld* 2B (*Bhg* B)), yet the plaintiff reneged on its part to sign off the Go-Live Certificate although the defendant had issued the requested letter of undertaking (pp 356–357 *RR Jld* 2B (*Bhg* B)). Further, since the System did Go-Live and Flexidata was laid down on 1 March 2015 as agreed by PW1 in cross-examination (p 355 *RR Jld* 28 (*Bhg* B)), we find the plaintiff had no excuse for refusing to sign the Go-Live Certificate. In any event, as PW1 agreed during cross-examination that it is best practice to have a final acceptance certificate to Go-Live and sign off, we are persuaded by the defendant's submission that it is only a formality for the plaintiff and not a condition under the agreement as the plaintiff contended. Therefore we agreed with the defendant's submission that the plaintiff cannot rely on its own wrong to benefit itself as it had refused to execute and return the Go-Live Certificate despite requesting for it.

[70] Returning to the point on the resolution of the 160 RFS issues relating to the core modules/primary functionalities/stop production contended by the plaintiff, we are of the view that the turning point started with the December emails. Vide email dated 15 December 2105 (p 337 CB2/4 Appeal 1110), DW1 wrote to PW1 requesting for confirmation of an SC meeting ('preferably by [14th] Dec') since there was no response forthcoming from PW1 which he had requested vide his earlier email dated 9 December 2015 which reads:

> Dear Mr Maran,
>
> We request your management consideration for this meeting.
>
> Thank you
>
> On 9 December 2015 at 16:15, Parameswaran Rajagopal
>
> <parem@censof.com> wrote:
>
> Dear Mr Maran, Pn Roslina
>
> We would like to request for an SC meeting with Northport Management preferably by Monday 14th Dec
>
> Agenda
>
> – Update on the RFSs status of Stop Production and Impede production issues

– Payment(s) due for project

– Other Matters

We noted that the agenda topic of 'Update of RFS's status of Stop Production and Impede Production issues' was the very agenda that the plaintiff was concerned about.

[71] Vide an email dated 15 December 2015 (p 337 CB2/4 Appeal1110), PW1 replied requesting for an update on status of the issues. The said email, among others, reads:

> While waiting for SC members confirmation for the meeting, can you please provide status update on pending deliverable/RFS, Sub-Ledger vs General Ledger figures discrepancy issue and system instability root cause and solutions with technical document. This document has been requested last SC meeting and yet to receive.

[72] DW1 responded immediately vide an email on *16 December 2015* (p 336 CB2/4 Appeal 1110), with the update on the status of the 160 issues as tabulated below:

No of Issues	Comment
140	Closed
19	User confirmation to close
1	Change request. Under testing and to close by 18/12/15

In cross-examination, whilst PW1 agreed that it is stated in the said email that DW1 had informed him, '... RFS we have closed 99% and currently we have about 19 RFS pending user's confirmation ... I have attached the analysis in the email, 140 close, 19 pending user, close by 18th December, 1. Total close 159, total issue reports 160 and about 99.38% have been closed'. PW1 disagreed to the follow up question:

> SSL: Yes. So you agree from this email, it has been confirmed that almost 99%, more than 99% of the RFS issue has been closed by CENSOF and 19 of the RFS is pending user's confirmation?

(pp 424–425 *RR Jld* 2B (*Bhg* B) Appeal 1110)

[73] Notwithstanding PW1's disagreement, in our judgment, what is critical is that PW1 admitted that there was no challenge to the contents of the email dated 16 December 2015 as is evident from his reply to the pointed question posed to him by the learned judge as follows:

YA: Did you deny? Can you just answer the question? Did you deny the contents of this email dated the 161h December?

TAMIL: No, I did not.

(pp 425–426 *RR Jld* 2B (*Bhg* B) Appeal 1110)

[74] Moving on, as there was no SC meeting called pursuant to its request and to discuss payments due to it, the defendant issued its letter dated 6 January 2016 requesting the plaintiff to take cognisance that Northport had gone live and that the plaintiff was 'utilising the said system to receive dues from your clients, bill for services to your clients, submit regulatory reports and produce financial reports amongst the other financial requirements'; the performance of 'the value-added reconciliation assistance tasks for the General Ledger entries against the associated subsidiary ledgers therein, the Accounts Payable entries therein again with the General Ledger and finally the Accounts Receivable entries therein against the General Ledger have been completed at our end'; and 'have passed findings to the Northport Finance and have not received any news pertaining to the way forward'. Critically the defendant ended on the note '... that we would find it extremely difficult to continue rendering our 24 x 7 support services to Northport should we not receive any payment for our invoices'. Two invoices No 003839A amounting to RM2,157,100 and No NMB001 amounting to RM109,604 were attached (pp 360–364 CB2/4 Appeal 1110).

[75] The plaintiff responded vide its letter dated *13 January 2016* which, among others, stated that it would be remitting the sum of RM109,604 via telegraphic transfer on 13 January 2016; refusal to make payment of invoice No 003839A on the basis of regurgitating the same issues but did not address the defendant's email of 16 December 2015; that the plaintiff 'shall commence evaluation of [defendant's] deliverables in the next 15 working days whereby [defendant] will be updated with the results accordingly' (pp 365–366 CB2/4 Appeal 1110).

[76] We noted there the plaintiff did not update the defendant of the proposed evaluation of the deliverables 'in the next 15 working days' which prompted the defendant to issue another letter dated 7 March 2016 reminding the plaintiff of its failure to do so and giving notice of institution of legal proceedings if the matter was left unresolved' (pp 367–368 CB2/4 Appeal 1110).

[77] Vide letter of *10 March 2016*, the plaintiff responded with the same reply 'Please be advised that we are in the midst of finalising our evaluation of

your deliverables and we will update you accordingly' (p 369 CB2/4 Appeal 1110).

[78] Vide letter of *30 March 2016*, we observed that the plaintiff stated that it had completed evaluation of the defendant's deliverables and raised the same complaints at paras A and B of the said letter. Under the heading 'Non resolution of Issues', where the plaintiff referred to communication on the issues, it stopped short of its letter of 9 September 2015. It is noteworthy that the plaintiff made no mention at all to the defendant's 1611212015 email which to reiterate was an update by the defendant on the 160 RFS issues requested by the plaintiff vide its email of 15 December 2015.

[79] In the letter of 30 March 2016, the plaintiff complained 'the reports generated by the System in respect of all the modules/functions in the System such as, the Accounts Receivable, Cash Book and GST, did not tally with our records' and 'our Finance Division was unable to identify the differences and verify the accuracy of the said reports'. Despite saying that the said complaint was crucial, we noticed no 'reports generated' were produced by the plaintiff. Hence we are of the view that the plaintiff failed to discharge the burden of proof in respect of its allegation of inability to identify the differences to verify the accuracy of the said reports (pp 370–372 CB214 Appeal 1110).

[80] In the light of what we have addressed above, we have shown that the plaintiff's contention that the letters dated 13 January 2016, 10 March 2016 and 30 March 2016 reinforced there were unresolved issues relating to the core modules/primary functionalities/stop production is untenable and devoid of merit. We find that the RFS issues were resolved on 16 December 2015 as PW1 in cross-examination admitted that he had no documents from the System for the period- December to March 2016 to prove those issues were subsisting and causing errors in the System post 16 December 2015 (pp 484–485 *RR Jld* 28 (*Bhg* B)). We find the learned judge had failed to undertake a critical evaluation of the 160 RFS issues by testing the plaintiff's oral evidence which clashed with the two contemporaneous emails of 15 December 2015 and 16 December 2015 of the defendant which proved otherwise. The learned judge also omitted to recognise that the plaintiff's failure to support its allegation with documentary evidence produced from the System after the 16 December 2015 email to prove otherwise was fatal to the plaintiff's allegations.

[81] The plaintiff argued that the defendant's contention that the 160 RFS issues were 'progressively resolved' cannot be true for two reasons:

(a) that the project plan and summary is not reliable evidence and cannot be accepted as conclusive evidence; and

(b) that there are 18 RFS in the Action List remained 'Open' and particularised as items Nos 1–19 at pp 20–21 of the appellant's (Northport) written submission in Appeal 1132.

[82] In respect of item (a) above, the plaintiff submitted that the project plan and summary (pp 341–345 CB2/4 Appeal 1110) is not reliable evidence and cannot be accepted as conclusive evidence as: (i) the RFS date/start date in the project plan and summary are different; and (ii) the open/close items in the summary and the action list are different. In this regard the plaintiff referred to the evidence of Muhammad Firdaus bin Abdullah Leong (DW3 —Assistant Manager, Special (Lead Consultant Time Zone 2)) who prepared the Project Plan. DW3 testified in cross-examination that the Project Plan do not have actual 'Start date' and 'Finish date' and he referred to the same as 'Default from the system' or 'Random date' as he did not key in the actual relevant dates. In respect of item (b) above, the plaintiff submitted the RFS issues remained 'Open' given: (i) that the 'Status' reference in the Action List (pp 544–610 CB3/3 Appeal1132) read as 'Open'; and (ii) the 'Action List (Details)' showed that the action to be performed in respect of the RFS was still within the defendant's purview and relied on DW3's evidence.

[83] The defendant highlighted to the panel on the workings of the action list using p 544 CB3/3 Appeal 1132 as an example:

> 'RFS Number: 15050360P' as every RFS given number
>
> 'Status: Open/Close'; here it is Open
>
> 'Assignment: Firdaus Leong' indication of who is the one doing the job from Defendant's side
>
> 'Date Lodged: 141512015, 14.56'
>
> 'Problem Description: The total amount of the NDSB debtors Ageing for the month of Apr 15 did not tally with GL amount'.

We find there is no merit in the plaintiff's aforesaid contentions given that the plaintiff was aware of the format as the defendant had put the entire bundle in and the complaint was specified in the format, yet the plaintiff did not raise and identify such complaints in its pleading, termination letter and witness statement; but it was only during cross-examination that the plaintiff raised the RFS List issue. Having cross-checked the following examples in the Action List vis a vis the project plan and summary, we found item 15050360P appeared as ID 149, item 150800 13P as ID 164, item 150800 12P appeared as ID 155 and item 150805 67P appeared as ID 166. In our view this is a case where having not reverted to the defendant regarding the defendant's 16 December 2015 email update on the 160 RFS issues requested by the plaintiff vide its email of 15 December 2015, the plaintiff used that evidence to say that the

defendant did not do work. The plaintiff's conduct of using its own failure to revert on issues as a basis to blame the defendant is unreasonable and smacks of lack of bona fide.

[84] The plaintiff submitted that acceptance of the System is a primary criterion of the agreement and referred to the following:

(a) Paragraph 4.1, Annexure F, envisage, inter alia, that the product and services offered by the Defendant 'must meet the requirement of the Finance Division in Northport';

(b) Paragraph 5.2, Annexure F states: 'The primary functionality of the solution is to cater to needs of', inter alia, 'General Ledger, Accounts Receivable, Accounts payable, Cash Book, Budget And Budgetary Control, Project Costing, Fixed Asset and Management information ...;

(c) Clause 7.2.3 (a) provides that the Defendant 'expressly warrants to Northport that at the date of delivery of the System', that it has 'complied with all requirements ...';

(d) Clause 7.2.3 (b) provides that the 'warranty in Sub-clause (a)', 'shall survive Northport's inspection' and 'Failure of Northport to inspect of acceptance or use of the System by Northport ... shall not signify acceptance of the quality of the System ...';

(e) Clause 6.1 which provides 'NORTHPORT hereby covenants to pay the Contractor in consideration of the completion of performance of the Works and the Contractor making good of any defects whatsoever to the Works as shall become payable at the times and in the manner specified under Clause 8.0 and Annexure D of this Agreement';

(f) Clause 8.0 which provides 'Payment to the Contractor for the Works shall be made in accordance with detailed invoice(s) verified by the Project manager in accordance with Annexure D herein based on actual work done.';

(g) Items 5 and 6 of Annexure D to the Agreement which provides the words 'sign off' as follows:

5	Upon sign-off on completion of Data Migration and System Integration Test	15% (RM555,000.00)	-NIL
6	Upon sign-off User Acceptance Test and completion of training	20% (RM740,000.00)	-NIL

[85] Items (a), (b) and (e) in para 84 touch on the functionality of the System and (g) in para 84, on the issue of 'sign-off' are matters which we have addressed earlier and we do not propose to repeat our position save to state that for the given reasons, there is no basis for the plaintiff to argue that the defendant has not delivered a fully functional System in accordance with the

terms and conditions of the agreement and that the System was not fit for its intended purpose and had not fulfilled the plaintiff's requirements.

[86] Clause 7.2.3 warranty of the agreement comprised paras (a) to (f). The plaintiff focused on paras (a) and (b) of cl 7.2.3 but did not look at it in totality. It would be misleading to read one clause without reading the whole clause in context as cautioned by *SPM Membrane* not to read clauses in isolation. It is essential that paras (d) and (e) of cl 7.2.3 be considered. For context, paras (a), (b), (d) and (e) are reproduced in verbatim as follows:

> (a) The Contractor expressly warrants to NORTHPORT that at the date of delivery of the System:
>
> (i) The Contractor has complied with all requirements, specifications, conditions, designs, instructions or data furnished by NORTHPORT; and
>
> (ii) The Systems are fit and sufficient for the purpose(s) for which they are supplied.
>
> (b) The warranty in Sub-clause 9(a) above shall survive NORTHPORT's inspection. Failure of NORTHPORT to inspect or acceptance or use of the System by NORTHPORT or signature by and on behalf of NORTHPORT on any Purchase Order/Invoice shall not signify acceptance of the quality of the System or that there has not a breach of warranty.
>
> (d) The Contractor agrees that immediately upon service of NORTHPORT's written notice on the defect of the System that, the Contractor shall at its own expense:
>
> (i) Correct completely the defects; or
>
> (ii) Replace such System at NORTHPORT's request.
>
> (e) If the Contractor does not within fourteen (14) days of the notice undertake such correction or replacement, then without having notified the Contractor, NORTHPORT may itself or on its behalf by a third party make such correction or replacement at the Contractor's cost and expense and the Contractor shall immediately indemnity NORTHPORT on demand for any such cost or expenses suffered by NORTHPORT.

(p 211 CB2/4 Appeal 1110)

[87] We find on the evidence the defendant had attended to the defects as evidenced by the minutes of the SC Meetings. In any event, para (e) provides that if after being given 14 days written notice the defects have not been corrected or replaced, the plaintiff may on its own or request a third party to undertake the rectification, provided the defendant shall immediately indemnify the plaintiff on demand for such cost or expenses incurred. Hence the remedy envisaged under the warranty clause in cl 7.2.3 is to indemnify and

not termination. This provision in our considered view lends credence to and is in harmony with the interpretation accorded to cll 22 and 23 of the agreement alluded in paras 25 to 27 above.

[88] Regarding item (f) of the agreement referred in para 84 above, we are of the view that the plaintiff cannot rely on its own failure to verify the works under cl 8 of the agreement. This is because the said issue is an afterthought given it was never pleaded and was raised for the first time when PW1 took the stand and in cross-examination PW1 admitted that he had not produced any document on verification (pp 471–472 *RR Jld* 28 (*Bhg* B)).

[89] The plaintiff referred to cl 24 of the agreement which states that 'Whenever mentioned, time shall be the essence of the Agreement'. In support of its proposition that time has always been of essence, the plaintiff cited:

(a) s 56(1) of the Contracts Act which states:

> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.; and

(b) the case of *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464 at p 466 in which the Federal Court held 'It is trite that there is a prima facie acceptance that in commercial contracts, time would be of the essence'.

[90] In response to the plaintiff's contention the RFS issues were not resolved by the 25 November 2015, it cannot be gainsaid that even after the deadline, the plaintiff continued to use the System for 1 1/3 years. In *Berjaya Times Squares*' case, the Federal Court held time was no longer the essence for purposes of s 56(1) of the Contracts Act as 'This was evidenced by the conduct of the respondent [the purchaser] itself in having several negotiations with the appellant [the property developer] with a view to expediting the completion of the construction of the property before intimating to the appellant of its decision to rescind the SPA. The respondent a/so took such a long period of time after the stipulated period and the extended period of completion to rescind the SPA ...' (per Zulkefli FCJ (as he then was) at p 604 para [5]). In fact the same principle was echoed by the Federal Court in *Damansara Realty Bhd* at p 479 para [31], which after stating 'It is trite that there is a prima facie acceptance that in commercial contracts, time would be of the essence' (as the plaintiff has submitted), the court further stated 'It can of course be rebutted if the parties indicate otherwise by words or conduct, but for a starting point, it must be assumed that the parties intended for time to be of essence. It would

not make commercial sense if otherwise'. The critical phrase 'It can of course be rebutted if the parties indicate otherwise by words or conduct' was unfortunately missed or omitted by the plaintiff.

[91] In this appeal before us, the learned judge opined her finding that the termination was invalid '[I]s fortified by the evidence of the plaintiff's acquiescence of the continuance of the Agreement by the 6 extended deadlines' (para 58 of the grounds of judgment). We find there is no error in the finding because applying the principle in *Berjaya Times Squares*' case, notwithstanding that 25 November 2015 was the deadline (six extensions were prior to that), no other deadline was fixed thereafter and the plaintiff continued to use the System and took time prior to its termination of the agreement in April 2016. In light of this, it is our considered view that time is at large and is no longer the essence of the agreement.

[92] There is an added reason as to why we are of the view that time is not of the essence in the agreement. In *Berjaya Times Squares*' case, after the Federal Court had at p 619 para [40] referred to the unanimous decision of the Supreme Court in *Hind Construction Contractors v State of Maharashtra* 1979 AIR 720 at p 619 the Federal Court opined as follows:

> [41] I respectfully accept that the foregoing passages are an accurate statement of the law governing s 56(1) of the Act. In my judgment, while individual contracts will fall to be interpreted in accordance with their own terms, it is a useful guide to construction that a stipulation as to time must be read along with other provisions of the contract to determine if time is truly of the essence of the contract. *Further, a clause providing for the payment of a sum whether as a fine, a penalty or as liquidated damages calculated on a daily basis for the period that the work undertaken remains unfinished on the expiry of the time provided in the contract would, in the absence of a contrary intention to be gathered from the contract, point to time not being of the essence*. (per Gopal Sri Ram FCJ (as he then was). (Emphasis added.)

[93] The warranty period clause in Annexure F of the agreement provides that in the event of non-compliance, the agreed remedy for unresolved issues is that the defendant shall pay a penalty fee. Applying the principle as emphasised in *Berjaya Times Squares*' case at p 620 para [41], we are of the considered view that since there is an absence of a contrary intention in the agreement in that no further timeline was fixed by the plaintiff after 25 November 2015 prior to the termination of the agreement in April 2016, the said clause point to time not being of the essence.

A Whether the learned judge erred on the application of the doctrine of substantial performance

[94] The plaintiff contended that there is no substantial performance of the agreement in the absence of acceptance of the System because:

B

(a) the terms of the agreement which demonstrate that acceptance of the System goes to the root of the System; and

C (b) thus the principle envisaged in:

(i) *Chain Cycle Sdn Bhd v Government of Malaysia* [2015] 9 MLJ 214 becomes applicable and the plaintiff is released from paying the balance of the invoices. The plaintiff, among others, referred to p 226 where the High Court held:

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> [30] From the passage extracted above, I am of the view that the arbitrator was entirely correct in coming to the conclusion that, where a contractor commits a breach that goes to the root of the contract, it will not be open for the contractor to argue that there had been substantial performance of the
E contract. The ratio in *Hoenig* is this: where a breach by the contractor is not one that goes to the root of the contract, the doctrine of substantial performance will apply to require the employer to pay for the price of the contract. The converse must necessarily also be correct; where the breach is one that does go to the root of the contract, the doctrine of substantial
F performance will not apply and the employer will not be obliged to pay the contracted price.

Learned counsel for the plaintiff submitted that in *Chain Cycle*, the
G arbitrator's award was affirmed when the High Court held that the failure to meet the required performance specifications meant that there was no substantial performance (p 215 Held (1)). Relying on the dicta of the High Court (p 226 para [30]), counsel submitted in the appeal before us, 'the defendant's failure to meet the requirement of the Finance Division in the plaintiff (which is a mandatory
H requirement) necessarily means that there could not have been substantial performance of the agreement.

(ii) the case of *Bolton v Mahadeva* [1972] 2 All ER 1322 was cited where the English Court of Appeal at pp 1325–1326 held:

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> In considering whether there was substantial performance I am of opinion that it is relevant to take into account both the nature of the defects and the proportion between the cost of rectifying them and the contract price. It would be wrong to say that the contactor is only entitled to payment if the defects are so trifling as to be covered by the de minimis rule.

[95] Counsel for the plaintiff further submitted where there is no acceptance of the System and there is no substantial performance of the agreement, it is the plaintiff's position that effectively the milestones in Appendix D to the agreement have not been achieved. If the milestones have not been achieved, the payment obligation to the defendant does not arise.

[96] With respect we are unable to accept the plaintiff's contention that there is no substantial performance of the agreement. In *KP Kunchi Raman v Goh Brothers Sdn Bhd* [1978] 1 MLJ 89, on the doctrine of substantial performance, the High Court adopted an authoritative statement of the law of Lord Denning in *Hoenig v Isaacs* [1952] 2 All ER 176 as follows:

> When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or alternatively, set them up in diminution of the price.

What the learned judge ought to have done was in order to disallow the balance sum in the face of the substantial performance which Her Ladyship found, she ought to make a finding that the defendant's breach, if any, went to the root of the contract 'such as abandonment of the work when it was only half done'. The learned judge made no such finding. In this regard we are of the view that the learned judge erred when she failed to go further and determine whether the issues had any impact or incapacitated the ultimate performance of the System ie go to the root of the agreement.

[97] We agreed with the defendant's submission that the plaintiff's extensive usage of the System for its financial operations for 1 1/3 years buttressed the learned judge's finding that there was substantial performance based on the amount of work done (para 57 of the grounds of judgment). This is evident from the testimony of DW3 on the usage from Go-Live on 1 March 2015 to 31 January 2016 as evident from for example (as at 31 January 2016):

> 1. There are 13,978 accounts created and 1,184,221 accounting treatment recorded amongst these account.
>
> 2. There are 14 banks account created with cashbook transaction of 38,941. This transaction consists of receipts, payment, adjustment and bank transfer.
>
> 4. The system usage analysis shows monthly incremental transactions from Go-Live in March 2015 to January 2016.

A See Usage Statistic for various modules in lOB Sahagian 88, pp 2403–2414

5. Next, there is also integrations transactions recorded and integrated from other 3rct party source system.

See lOB Sahagian 88, p 2402

B There are also number of reports generated from the System to show that usage. For example:

– Cash Flow Statement (pp 2416–2419)

– Statement of Financial Position (pp 2421–2422, 2513–2514)

C – Summary Trial Balance (pp 2424–2511)

– Statement of Comprehensive Income (p 2516, 2519–2520)

See IDB Sahagian 88, pp 2416–2523

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[98] We find that the evidence of data usage is proof that the System was being fully utilised and recording hundreds of thousands of various types of transactions and the System analysis showed incremental transactions from March 2015 to January 2016. What is most telling is that the plaintiff failed to E produce any counter data or contemporaneous documents from the System to show this data was wrong or that the System could not carry out these transactions. In fact PW2 agreed in cross-examination that the plaintiff has been using the System to bill customers and collect payment and the plaintiff had performed very well financially for the year 2015/2016 (pp 574–575 *RR Jld* 2C (*Bhg* B).

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[99] We find there is no merit to the contention of the plaintiff that there is no document to show plaintiff accepted the System. The said contention is negated by the evidence from PW1 which confirmed extensive usage as follows:

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SSL: Now you are talking about live, never mind. Do you agree that Northport at that time did not reject or terminate the contract at all? You agree with me?

TAMIL: Yes, agree.

H YA: You agree that NP accepted the system, and was using the system for daily operations?

TAMIL: Yes, they were using for daily operation.

I **[100]** In reply to the defendant's contention that there was usage of the System, it is the plaintiff's position that there is no acceptance of the System and there is no substantial performance of the agreement because to the plaintiff, usage of the System does not equate to acceptance of the System as one can be using something; it is quantitative and not qualitative. In this regard

we find there is no merit in the plaintiff's submission as there are no documents produced by the plaintiff to challenge that it was not qualitative.

[101] We are of the view that the case of *Chain Cycle* relied on by the plaintiff to say there was no substantial performance is flawed and the said case can be distinguished. In *Chain Cycle* the pertinent facts to be noted are: (i) the plant failed to meet the performance specification in the first testing in May 20013; (ii) design modification was then made and a second testing done in May 2004 also failed; and (iii) thereafter the plaintiff refused to undertake further testing and the defendant therefore terminated the agreement. However, in the appeal before us, we accepted the defendant's submission that the facts are different and the salient distinguishing facts as are as follows:

(i) UAT'S and parallel run testing were carried out and the plaintiff proceeded to thereafter accept the System by going live and using the same extensively for more than 1 1/3 years;

(ii) The System had moved into a 36 months Warranty phase post 'Go-Live' and the plaintiff were registering the issues in the RFS;

(iii) The Defendant attended to those issues and resolved them within the on-going Warranty Period;

(iv) Even as late as January 2016, the plaintiff was insisting that the Defendant perform their obligations under the Agreement by providing Support Services.

[102] The learned judge at para 70 of the grounds of judgment held:

> The Defendant's counter claim for Amount (1) and Amount (2) and damages are similarly dismissed as there is cogent evidence before this court that it had failed to deliver a fully functioning financial system in accordance with the Agreement.

With respect we are of the view that the learned judge has erred in her finding in respect of the defendant's counterclaim for Amount 1. In light of the reasons discussed where it is our findings that there is evidence of extensive usage of the System for 1 1/3 years, acceptance of the System by the plaintiff and there is no failure of the defendant to deliver a fully functional System in accordance with the terms and conditions of the agreement and that the System was not fit for its intended purpose and had not fulfilled the plaintiff's requirements (see para 85 above), in our judgment, the defendant is entitled to the balance RM2.22m (Amount 1) for the delivery of the System to the plaintiff who is still in possession and control of the System till to date.

[103] In addition, the learned judge found that the termination was of the agreement was invalid and dismissed the counterclaim. We made a finding that

A the plaintiff is in constructive breach of the agreement (see para 41 above) which made it impossible for the defendant to continue performance under the agreement during the warranty period. Following *Akitek Tenggara* when the court finds the agreement to be invalid, the defendant is entitled to enforce its rights on the breach and ipso facto the defendant is entitled to the balance sum B due and put in a position as if contract had been performed. This was not considered by the learned judge and Her Ladyship erred in dismissing the counterclaim. Hence we are of the view that the defendant's counterclaim for the balance sum of RM2.22m due under the agreement (Amount 1) ought to be allowed. C

[104] The defendant's counterclaim for Amount 2 is in respect of the Additional Work purportedly carried out by the defendant for Enhancement, Additional Services and Jitterbit in the sum of RM1,986,000. We do not allow D the claim for this amount briefly, because there are no grounds raised in the MOA in respect of Amount 2; there is one para which briefly refers to the dismissal of Amount 2. It was raised for first time in defence and counterclaim. It is an afterthought and was never communicated to the plaintiff during the period of the agreement. It is not invoiced. Further the claim is based on Type E 1 and Type 2 mandate rates which have not been agreed between the parties and not stated in the agreement. This is relevant because Amount 2 is RM1.98m which is 53% of contract sum. The supporting evidence for Amount 2 in the form of patchy breakdowns were not made available to the plaintiff. There are no primary documents supporting the timesheet F breakdown.

[105] In relation to defendant's submission that expert testimony must be adduced to prove that the issues were not resolved because they are technical, we are inclined to agree with the plaintiff that it is not necessary as the SC G Meetings are cogent clear evidence of the issues faced by parties and there are innumerable SC Meetings Minutes.

CONCLUSION

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[106] For all the foregoing reasons our unanimous decision in respect of the two appeals are as follows:

(a) in Appeal 1132, as we found there were no merits, the said appeal was dismissed;

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(b) in Appeal 1110, as we found there were merits, in the exercise of our appellate intervention, we allowed part of Appeal 1110 ie for Amount 1 only in the sum of RM2.22m with interest and at the rate of 5% from the date of judgment till full and final settlement; and

(c) global costs of RM40,000 was awarded to the defendant subject to payment of allocatur. A

Order accordingly.

Reported by Ashok Kumar B

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